

232152

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
STEPHANIE P. LYONS
STEPHANIE A. ARCHULETA

OF COUNSEL
DONALD G. AVERY

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

April 2, 2012

VIA HAND DELIVERY

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

APR 2 2012
RECEIVED

ENTERED
Office of Proceedings

APR 02 2012

Part of
Public Record

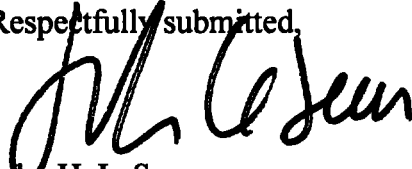
Re: STB Docket No. 42120, *Cargill, Incorporated v.*
BNSF Railway Company

Dear Ms. Brown:

Enclosed for filing **UNDER SEAL** in the above-referenced proceeding please find an original and ten (10) copies of the Highly Confidential version of Complainant Cargill, Incorporated's Final Brief. Also enclosed for filing are an original and ten (10) copies of the Public Version of the Final Brief.

Please date stamp the extra copy of this cover letter and the enclosed filings and return them to our messenger. Thank you for your attention to this matter.

Respectfully submitted,



John H. LeSeur
An Attorney for Complainant

Enclosures

cc: Counsel for Defendant BNSF Railway Co.

TABLE OF CONTENTS

[illegible]

III.	CARGILL CORRECTLY CALCULATED THE HUGE PROFITS BNSF IS COLLECTING UNDER THE ATI	17
A.	Cargill Properly Utilized All Provided Actual Shipment T&O Data in Developing BNSF’s Actual Incremental Cost of Fuel.....	18
B.	Cargill Properly Utilized the Prices BNSF Actually Paid for Fuel in Calculating BNSF’s Actual Incremental Cost of Fuel	19
C.	Cargill Properly Excluded Non-Incremental Fixed Fuel Costs in Developing BNSF’s Actual Incremental Cost of Fuel	20
D.	Cargill Properly Excluded Non-Locomotive Fuel Costs in Developing BNSF’s Actual Incremental Cost of Locomotive Fuel	21
IV.	CARGILL HAS DEMONSTRATED THAT BNSF’S PROFITEERING IS DUE TO DESIGN FLAWS IN BNSF’S FUEL SURCHARGE METHODOLOGY	22
A.	The ATI Uses An Unreasonable Step Function	22
B.	The ATI Uses An Unreasonable Strike Price and First Step Increment.....	23
V.	BNSF’S PROFITEERING IS NOT LEGALLY EXCUSED.....	23
A.	BNSF’s Profiteering Is Not Excused Under Its Bad Intent and Bad Management Defenses.....	24
B.	BNSF’s Profiteering Is Not Excused Under Its Phantom Fuel Price Defense.....	25
C.	BNSF’s Profiteering Is Not Excused Under Its <i>De Minimis</i> Profiteering Defense	26
VI.	CARGILL SEEKS REASONABLE PRESCRIPTIVE RELIEF.....	27
A.	The Board Should Prescribe Reasonable Step Functions.....	28
B.	The Board Should Issue Reasonable Prescriptive Relief Correcting Other Errors in the ATI and Setting the Unlawful Amounts BNSF Has Collected from Cargill Under the ATI	29
	CONCLUSION	30

Cargill, Incorporated (“Cargill”) submits this Final Brief and in support hereof states as follows:

PREFACE AND SUMMARY

In its decision served on March 1, 2012 (“*Mar. 2012 Decision*”), the Surface Transportation Board (“STB” or “Board”) directed the parties to submit final briefs in Phase I of this case¹ addressing two questions:

1. Assuming that a fuel surcharge program need not produce revenues that match precisely the carrier’s incremental fuel costs to be reasonable, what standard should the Board use, and what factor(s) should it consider, in determining what level of excess recovery would demonstrate an unreasonable practice?

2. Putting aside the issue of whether a fuel surcharge program was reasonable when designed, at what point in time would a carrier’s over recovery of incremental fuel costs become an unreasonable practice?

Id. at 1.

The Board’s two questions properly focus on “excess recovery” and “over recovery” because both Cargill’s and BNSF Railway Company’s (“BNSF”) evidence shows that the revenues BNSF has collected under the Assailed Tariff Item (“ATI”)² substantially exceed the actual incremental fuel cost increases BNSF has incurred in moving the agricultural commodity (“Ag”) traffic and Other Freight (“OF”) traffic subject to the ATI, thus turning the ATI into a profit center for BNSF. Cargill calculates that over the five year study period in this case (2006 to 2010), BNSF has used the ATI to generate profits totaling \$560.9 million. BNSF

¹ In its decision served on April 8, 2011, the Board divided this case into two phases: a merits phase and a damages phase.

² Item 3375, Section B of BNSF Rules Book 6100-A. For movements occurring after January 1, 2011, the term ATI also includes Item 3376, Section B in BNSF Rules Book 6100-A, which is the rebased version of Item 3375, Section B.

calculates these profits at { }.

The Board's first question asks the parties to identify the standards and factors the Board should utilize to determine what level of fuel surcharge profiteering constitutes an unreasonable practice under 49 U.S.C. § 10702(2). Cargill answers the Board's first question in Part I below: the Board should utilize the standard set forth in its decision served on January 4, 2011 ("*Jan. 2011 Decision*"), which holds that a carrier engages in an unreasonable fuel surcharge practice if "design elements in the challenged fuel surcharge allow [it] to recover substantially in excess of the incremental price of fuel." *Id.* The Board should also consider eight factors, drawn from Cargill's fuel study, to determine whether a carrier's excess recovery is substantial. Application of these factors shows that the profits BNSF is earning under the ATI constitute an unreasonable practice at both the correct profit levels calculated by Cargill and the { } levels calculated by BNSF.

The Board's second question asks the parties to identify when a carrier's fuel surcharge profiteering becomes an unreasonable practice. Cargill answers the Board's second question in Part II below: a carrier's application of a fuel surcharge becomes unreasonable in the first year when it begins generating substantial profits over a sustained time period. In this case, { } Cargill's { } cost studies show that BNSF began earning substantial and sustained profits under the ATI starting in 2006. These results are confirmed by {

}.

The Board's *Mar. 2012 Decision* also permits the parties to address any other issues "they deem relevant." *Id.* at 1. Cargill responds by summarizing the extensive evidence and argument it has already tendered in this case demonstrating Cargill's calculation of BNSF's

profits (\$560.9 million) over the five year study period is correct (Part III); this substantial profiteering is due to three design flaws in the ATI (Part IV); the law does not excuse BNSF's profiteering (Part V); and the prescriptive relief that Cargill requests is reasonable (Part VI). BNSF has clearly misused the ATI as a profit center for years and it is now incumbent on the Board to stop this unlawful practice.

I.

CARGILL'S RESPONSE TO THE BOARD'S FIRST QUESTION

The Board should adhere to the standards set forth in its *Jan. 2011 Decision* holding that a carrier engages in an unreasonable practice when it collects substantial profits under a challenged fuel surcharge due to design errors in the fuel surcharge methodology. The Board should also utilize eight factors drawn from Cargill's fuel surcharge study – the most comprehensive study of its type ever presented to the Board – to determine whether a party has met its burden of proof under the governing *Jan. 2011 Decision* standards.

A. BNSF Engages in An Unreasonable Fuel Surcharge Practice When It Collects Fuel Surcharge Revenues Under the ATI That Substantially Exceed BNSF's Actual Incremental Fuel Costs Due to Design Flaws in the ATI

The standard governing when the level of a carrier's fuel surcharge profiteering constitutes an unreasonable practice is set forth correctly in Board's *Jan. 2011 Decision*. There, the Board ruled that a carrier engages in an unreasonable fuel surcharge practice when it collects fuel surcharge revenues substantially in excess of its incremental fuel costs due to design flaws in the carrier's fuel surcharge methodology. *See id.* at 5.

The Board's ruling came in response to BNSF's motion to dismiss the "Profit Center" count of Cargill's Complaint, which alleged that BNSF was engaged in an unreasonable practice because BNSF was using the ATI "to extract substantial profits over and above its

incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied.”

Complaint at ¶ 7. BNSF argued that the Profit Center count was not permitted under the Board’s holdings in *Fuel Surcharges*³ and *Dairyland*,⁴ but the Board agreed with Cargill that BNSF would be found to have engaged in an unreasonable practice if Cargill’s proof demonstrated that BNSF was earning revenues “substantially in excess” of its actual incremental costs due to flawed “design elements” in the ATI:

In *Dairyland*, the Board clarified the types of claims that properly could be brought under *Fuel Surcharges*. . . .

Cargill’s Profit Center claim is not inconsistent with our guidance in *Dairyland*. . . .

Consistent with *Dairyland*, *Cargill may present evidence to demonstrate that design elements in the challenged fuel surcharge allow BNSF to recover substantially in excess of the actual incremental cost of fuel incurred in providing the rail services to the entire traffic group to which the surcharge applies.*

Jan. 2011 Decision at 5 (emphasis added).⁵

Cargill submits that the determination of when fuel surcharge revenues are “substantially in excess” (*id.*) of actual incremental fuel costs does not lend itself to a bright-line dollar amount or percentage cut-off point. However, in this case, there is no serious question that this differential is substantial using either Cargill’s calculation of BNSF’s incremental fuel costs (which produce a total overcharge on Ag and OF traffic of \$560.9 million over the five year study period) or BNSF’s calculation of its fuel costs (which produce a total overcharge on

³ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (“*Fuel Surcharges*”) (STB served Mar. 14, 2006) (“*Fuel Surcharges I*”); (STB served Aug. 3, 2006) (“*Fuel Surcharges II*”); (STB served Jan. 26, 2007) (“*Fuel Surcharges III*”); (STB served Aug. 14, 2007) (“*Fuel Surcharges IV*”).

⁴ *Dairyland Power Coop. v. Union Pac. R.R.*, STB Docket No. 42105 (STB served July 29, 2008) (“*Dairyland*”) at 1.

⁵ Cargill’s petition for reconsideration of the Board’s dismissal of its double recovery claim remains pending before the Board.

Ag and OF traffic of { } over the five year study period). This conclusion is predicated on factors derived from the comprehensive fuel surcharge study Cargill submitted in this case.

B. Consideration of the Relevant Factors Demonstrates That the Amount of BNSF's ATI Profiteering Constitutes An Unreasonable Practice

As shown in Cargill's fuel surcharge study, the following eight factors are pertinent in determining whether fuel surcharge revenues are substantially in excess of incremental fuel costs:

1. The Analysis Time Period. The first factor the Board should consider is whether the fuel surcharge analysis period is reasonable. In the instant case, Cargill utilized a five year analysis period, starting on January 1, 2006, the date the ATI first went into effect, and ending on December 31, 2010, the last date BNSF provided fuel surcharge data in discovery. *See* Joint Opening Verified Statement of Thomas D. Crowley and Robert D. Mulholland ("C/M Op. V.S.") at 2, 6-7. BNSF also utilized the same five year analysis period. *See, e.g.*, Reply Verified Statement of Benton V. Fisher ("Fisher Reply V.S.") at 35, Table 9. Use of the five year analysis period is reasonable in this case as it is not disputed, and provides data over a 60 month time frame, which is certainly more than long enough to make a reasoned finding whether the ATI revenues were substantially in excess of BNSF's incremental fuel costs on the traffic subject to the ATI.

2. The Scope of the Analysis. The second factor the Board should consider is whether the scope of the analysis is reasonable. In the instant case, Cargill calculated fuel surcharge revenues and incremental fuel costs on each shipment subject to the ATI – a total of { } shipments. *See* C/M Op. V.S. at 6, 8. Making these calculations on each shipment

is clearly reasonable. BNSF also made revenue and incremental cost calculations for each shipment subject to the ATI. *See* Fisher Reply V.S. at 11, 35.

3. The Methodology Used to Calculate Fuel Surcharge Revenues. The third factor the Board should consider is whether the methodology used to develop fuel surcharge revenues is reasonable. In this case, Cargill developed fuel surcharge revenues for the BNSF portion of each of the { } shipments from waybill data BNSF supplied in discovery. *See* C/M Op. V.S. at 6. The specific procedures Cargill followed are explained in its evidence, and supported by detailed electronic workpapers. *Id.* at 6-7. Using these procedures, Cargill calculated that BNSF had collected surcharge revenues totaling { } during the five year study period on the Ag and OF traffic subject to the ATI. *Id.* at 7, Table 1.

Cargill's approach is clearly reasonable, as it developed an accurate measurement of the actual fuel surcharge revenues BNSF collected on each study movement. Moreover, BNSF utilized the same methodology that Cargill employed to develop fuel surcharge revenues and reached the same result – *i.e.*, BNSF collected a total of { } fuel surcharge revenues on the Ag and OF traffic subject to the ATI. *See* Fisher Reply V.S. at 11.

4. The Methodology Used to Calculate Incremental Fuel Costs. The fourth factor the Board should consider is whether the methodology used to develop incremental fuel costs is reasonable. Cargill developed a model to calculate incremental fuel costs for each movement subject to the ATI. This model calculated for each of the { } study movements, the base fuel cost at the fuel price level BNSF claims is included in the movement's base rate and the fuel cost BNSF actually incurred at the time of shipment. The difference between these two costs equaled BNSF's actual incremental fuel cost at the time of shipment. For each studied movement, Cargill used traffic and operating data BNSF produced in

discovery, monthly fuel price data BNSF produced in discovery, and the Board's Uniform Railroad Costing System ("URCS") unit cost data as inputs into its model. Cargill also provided a detailed step-by-step explanation of the model in its narrative evidence and included the model itself (and all supporting model inputs and calculations) in its electronic workpapers. *See C/M Op. V.S. at 8-16.*

Cargill's model is a reasonable one because it is methodologically sound, it produces accurate results, and it is similar to the model BNSF used in developing its calculation of incremental fuel costs. *See Fisher V.S. at 11-34.* The differences between the parties' costs in this case are not attributable to the use of different incremental costing models, but to differences over the inputs each side used in these models. *See C/M Rebuttal ("Reb.") V.S. at 8-9.* As Cargill has demonstrated in its evidentiary filings, and reaffirms in Part III of this Brief, the inputs Cargill uses develop the most accurate incremental fuel costs for each study move. Also, Cargill and BNSF are in agreement that URCS unit cost data, not management cost data, should be used in the incremental costing model. *See BNSF Reply Evidence and Argument ("BNSF Reply") at 49.*

5. The Amount of the Over-Recovery/Profiteering. If the Board finds that the analysis period is reasonable, the scope of the analysis is reasonable, the fuel surcharge revenue calculations are reasonable, and the incremental fuel costs have been calculated in a reasonable manner, the next factor for the Board to consider in determining whether the amount of the over-recovery (fuel surcharge revenues minus incremental fuel costs) is substantial is the amount of the over-recovery/profits collected.

In determining whether the over-recovery is substantial, the Board should be guided by the public interest in discouraging rail carriers from using fuel surcharge mechanisms

as profit centers. These public interests are discussed in more detail below, but as specifically applied to the amount of over-recovery factor, the public interest calls for the Board to view an over-recovery as substantial if it is not *de minimis* on a total dollar basis. This definition of “substantial” is used in analogous settings where the term substantial is defined in reference to the public interest.⁶

Cargill calculated that BNSF’s over-recovery under the ATI during the five year study period equaled \$560.9 million and BNSF calculated its over-recovery under the during the five year study period equaled { }. While BNSF’s calculation of the over-recovery is { }, both calculations show over-recoveries that clearly are “substantial enough in terms of dollar volumes so as not to be *de minimis*.” *Fortner*, 394 U.S. at 501.

In its evidentiary filings, BNSF attempted to downplay its massive ATI profits by stating the overcharges in percentage terms, not absolute dollar amounts. Using this metric, BNSF’s fuel surcharge revenue for all Ag and OF traffic subject to the ATI during the five year analysis period (2005 to 2010) exceeded BNSF’s incremental costs by an annual average ratio of { } (using Cargill’s costs) and { } (using BNSF’s costs):

⁶ See, e.g., *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501-502 (1969) (“*Fortner*”) (finding “substantial” amount of commerce in antitrust tying case is adversely impacted if dollar volume of commerce in the tied product market is not “*de minimis*” in order to advance Congressional directives encouraging “private antitrust litigation . . . to vindicate the important public interest in free competition”); *Siegel v. Chicken Delight, Inc.*, 311 F.Supp. 847, 850 (N.D. Cal. 1970) (applying *Fortner* test and finding that “millions of dollars” in commerce was significant impact) *aff’d in part, rev’d in part on other grounds*, 448 F.2d 43 (9th Cir. 1971); *Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 610 (6th Cir. 2008) (claim is deemed to raise “substantial” federal question sufficient to invoke jurisdiction of a federal court “unless prior decisions inescapably render it frivolous”) (internal quotation marks omitted). *Accord Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007) (defining whether release of hazardous waste causes “substantial endangerment to health or the environment” under 42 U.S.C. § 6972(a) as release that raises “reasonable cause for concern” to promote public interest in “protecting public health, welfare and the environment”) (internal quotation marks omitted).

Brief Table 1
Fuel Cost Recovery Using BNSF Costs, ATI Traffic

	Cargill	BNSF
2006	{ }	{ }
2007	{ }	{ }
2008	{ }	{ }
2009	{ }	{ }
2010	{ }	{ }
2006-2010 Total	{ }	{ }

Fisher V.S. at 35, Table 9.

BNSF’s efforts to downplay its collection of massive profits fail. Even using BNSF’s own { } costs, BNSF has been using the ATI to generate average profits of { } during the five year analysis period, with average profits { } of the analysis period. Profit margins at these levels are clearly “substantial” and, of course, equal total profits of { }. Using the correct costs shows that BNSF has been using the ATI to generate profits of { } which equal total profits of \$560.9 million.

6. The Pattern of the Over-Recovery/Profiteering. Cargill’s analysis shows that BNSF collected revenues substantially in excess of its incremental fuel costs in each of the five study years. BNSF’s analysis also shows that BNSF collected revenues {

}

This pattern is significant because it demonstrates that the ATI’s profit-generation was not an isolated occurrence due to unusual events, but a repeated, systematic use of the ATI to generate substantial profits.

7. Design Flaws Causing the Over-Recovery/Profiteering. The Board held in its *Jan. 2011 Decision* that a shipper had to demonstrate that an assailed fuel surcharge

was producing substantial profits due to “design elements” in the surcharge methodology. *Id.* at 5. Cargill’s evidence demonstrates that the ATI is generating substantial profits due to three design flaws in the ATI: the use of surcharge step functions that do not reasonably track BNSF’s actual fuel costs, the use of an unreasonable strike-price equivalent Highway Diesel Fuel (“HDF”) value, and the unreasonable application of the first step increment surcharge. *See* Cargill Opening Statement (“Cargill Op.”) at 23-38; Cargill Rebuttal Statement (“Cargill Reb.”) at 29-34. BNSF appears to agree that the ATI should use reasonable step functions, a reasonable strike-price equivalent HDF value, and reasonably apply the first step increment, but disputes Cargill’s proof that the ATI is unreasonable in these three respects. *See* BNSF Reply at 63-69. Cargill has demonstrated that its proof is correct, and summarizes that demonstration in Parts III and IV below.

8. The Public Interest. BNSF and other rail carriers began an industry-wide push for permanent fuel surcharges starting in 2003. They claimed that these surcharges were necessary for them to recoup promptly incremental fuel cost increases. However, there has been widespread concern expressed by rail shippers, Members of Congress, the United States Department of Transportation, and the United States Department of Agriculture that railroads should not be permitted to use fuel surcharges as profit centers. *See* Cargill Op. at 5-6, 13, 31. The Board has agreed, issuing a series of decisions holding that railroads may not use their fuel surcharges as profit centers. *See, e.g., Fuel Surcharges III* at 1, 10-11; *Dairyland* at 6, *Jan. 2011 Decision* at 5.

Given the public interests at stake, the Board should interpret its “substantial” over-recovery standard in a way that discourages carrier profiteering at the expense of the shipping public. In this case, there is no reasonable doubt that BNSF has engaged in an

unreasonable practice because the evidence adduced by both BNSF and Cargill shows that BNSF is collecting “substantial” profits under the ATI. However, in cases where doubts may exist, the Board should interpret what is substantial in a way that incents carriers not to use their fuel surcharges as profit centers.

II.

CARGILL’S RESPONSE TO THE BOARD’S SECOND QUESTION

The Board’s second question asks at what point in time did BNSF’s substantial profiteering become an unreasonable practice. The answer in this case is 2006.

A. BNSF’s Over-Recoveries Under the ATI Became An Unreasonable Practice in the Year the ATI First Began Generating Substantial Profits Over A Sustained Time Period: 2006

The answer to the Board’s second question is determined by reviewing the over-recovery data set to determine when the challenged fuel surcharge first began generating substantial profits over a sustained time period. In this case, Cargill’s cost calculations show substantial over-recoveries in every year starting with 2006 and BNSF’s cost calculations show { }:

**Brief Table 2
Parties’ Profit Calculations**

Year	Cargill	BNSF
2006	\$ 88,800,000	{ }
2007	\$ 49,500,000	{ }
2008	\$182,800,000	{ }
2009	\$ 77,900,000	{ }
2010	\$161,900,000	{ }
Total	\$560,900,000	{ }

See C/M Reb. V.S. at Exh. 15; BNSF Workpaper “60-Month MBFSC Fuel Recovery.xls.

Using Cargill’s correct overcharge figures, it is clear that BNSF’s over-recoveries began in 2006. BNSF’s {

} . While it is clear that BNSF's unreasonable practice began in 2006, Cargill submits the Board does not need to pinpoint the exact date the practice became unreasonable since Cargill is seeking damages only on shipments starting in April of 2008. {

} that, as of April 2008, BNSF was using the ATI as an unlawful profit center.

Cargill's answer to the Board's second question advances the public interest.

The principal objective of defining when a fuel surcharge practice becomes unreasonable appears to be to define the start of the reparations period. Defining this start date as the date a sustained period of over-recoveries begins will incent carriers to carefully monitor their fuel surcharge programs and make timely adjustments to prevent customer overcharges or, if they do not, pay damages to their customers.

Cargill's answer to the Board's second question is also not unfair in any way to BNSF. BNSF has been on notice since the Board issued its *Fuel Surcharges III* decision in January of 2007 that the Board would not tolerate the use of fuel surcharges as profit centers, and that the Board would permit shippers to file individual unreasonable practice actions seeking damages. *Id.* at 5-10. The Board reaffirmed these rulings in its July 2008 decision in *Dairyland* (*id.* at 5-7) and its *Jan. 2011 Decision* in this case. *Id.* at 4-5. BNSF has only itself to blame for its failure to take any remedial steps to address its longstanding use of the ATI as an unlawful profit center.

B. {

}

{

}

1.

{

}

The ATI utilizes a 1:4 step

function, *i.e.*, there is a one cent increase per loaded car-mile for every four cent increase in HDF

prices above a stated initial strike price. {

}⁷

• {

}

The ATI went into effect in 2006. Between

January 1, 2006 and April 24, 2007, the ATI applied only to BNSF's Ag traffic. *See* Cargill Op.

at 8. {

}:

Brief Table 3

{	}	{	}
{	}	{	}
{	}	{	}
{	}	{	}

Cargill Reb., Counsel's Reb. Exh. at 4.

{

⁷ {

}. *Id.*

},

{

}

• {

};

Brief Table 4

{	{	{	{
}	}	}	}
{ }	{ }	{ }	{ }
{ }	{ }	{ }	{ }
{ }	{ }	{ }	{ }

Cargill Reb., Counsel’s Reb. Exh. at 4.

{

}

2.

{

}:

- {

}

Brief Table 5

{	{
{ }	{ }
{ }	{ }
{ }	{ }
{ }	{ }
{ }	{ }
{ }	{ }

Id., Counsel’s Reb. Exh. at 7.

- {
} ⁸ {

}. *Id.*

• **Fuel Efficiency Improvements.** BNSF has achieved substantial fuel efficiencies since 2005. BNSF’s public and {

}. *See* Cargill

Op. at 31-34. In 2006, BNSF’s CFO told the STB that increased fuel efficiency “needs to be accounted for” in BNSF’s fuel surcharge tables (*id.* at 33-34), and {

} *Id.* at 34 (citing

D-250122).

- {

}.

⁸ {

}.

• {

}

3. {

}

III.

CARGILL CORRECTLY CALCULATED THE HUGE PROFITS BNSF IS COLLECTING UNDER THE ATI

In its *Jan. 2011 Decision*, the Board held that BNSF would be engaged in an unreasonable practice if Cargill demonstrated that BNSF was earning substantial profits under the ATI due to design flaws in the ATI, with profits measured as the difference between the revenues BNSF was collecting under the ATI and “the actual incremental cost of fuel [BNSF]

incurred in providing the rail services to the entire traffic group to which the surcharge applies.”

Id. at 5.

Cargill calculates that BNSF utilized the ATI to collect \$560.9 million in profits between 2006 and 2010. BNSF calculates the profits at { }. The parties agree on the amount of revenue BNSF collected under the ATI. The difference between the two profit calculations { } is attributable the fact that Cargill followed the Board’s instructions to develop BNSF’s actual incremental cost of fuel, whereas BNSF did not.

A. Cargill Properly Utilized All Provided Actual Shipment T&O Data in Developing BNSF’s Actual Incremental Cost of Fuel

In discovery, BNSF provided for most shipments subject to the ATI fourteen actual Traffic and Operating (“T&O”) data inputs. *See* Cargill Reb. at 9-10. Cargill used all fourteen of these inputs in developing the incremental fuel cost BNSF incurred to move each shipment. BNSF, however, used only nine of these T&O inputs, and substituted system-average T&O figures for the remaining five T&O inputs: tare tons per car per shipment; number of trains per shipment; number of locomotives per train per shipment; trailing weight per train per shipment; and number of inter-and intra-train switches. *Id.*

BNSF’s failure to utilize these five actual T&O inputs inflates BNSF’s cost calculations by { } (*see* C/M Reb. V.S. at 2) and produces obviously inaccurate cost results. For example, if a shipment actually contains 3 locomotives and a trailing weight of 10,000 tons, Cargill develops its incremental fuel costs using this actual shipment data, whereas if the “system average” T&O factors for this shipment are 3.5 locomotives and a trailing weight of 6,000 tons, BNSF costs the shipment using these system-average inputs. *See* Cargill Reb. at 10-11.

BNSF claims that Cargill’s use of accurate T&O data is legally impermissible

under the Board's rulings precluding adjustments to URCS Phase III costs in maximum rate cases. However, as Cargill discussed in detail in its Rebuttal, this case is not a rate case; the parties did not develop Phase III movement costs; the policy reasons that led the Board to limit adjustments to Phase III costs in maximum rate cases have no application here; and use of accurate actual T&O data is necessary to calculate accurately the costs the Board directed the parties to develop in this case – "the actual incremental cost of fuel incurred" by BNSF in transporting the Ag and OF traffic subject to the ATI. *Id.* at 11-16.

B. Cargill Properly Utilized the Prices BNSF Actually Paid for Fuel in Calculating BNSF's Actual Incremental Cost of Fuel

In its cost study, Cargill utilized the actual prices BNSF pays for fuel as reported by BNSF in its reports to both the STB and the Securities and Exchange Commission ("SEC"). These prices include the impact of BNSF's fuel hedging activities because, as recognized by both the STB and the SEC, the hedge effectively locks in the price for the gallons of diesel fuel subject to the hedge. *See id.* at 27-28.

In its cost study, BNSF uses what it calls BNSF's "pre-hedge" fuel prices. Fisher Reply V.S. at 34. BNSF claims that these prices reflect the prices it would have paid for fuel but for its fuel hedges. *Id.* at 33-34. Of course, BNSF did engage in fuel hedges, so the actual fuel prices it paid – and reported to its regulators – are its hedged fuel prices. BNSF's use of unhedged fuel prices artificially increases its calculation of BNSF's fuel costs by {
}. C/M Reb. V.S. at 2.

Cargill's use of BNSF's hedged fuel prices is clearly superior to BNSF's use of unhedged fuel prices because the hedged fuel prices reflect the price per gallon BNSF actually paid for fuel and the actual fuel costs BNSF incurred. These actual prices – not artificially increased prices – should be used in calculating BNSF's actual incremental cost of fuel.

C. Cargill Properly Excluded Non-Incremental Fixed Fuel Costs in Developing BNSF's Actual Incremental Cost of Fuel

The Board has made very clear that a fuel surcharge can be used only to recover “the incremental cost of fuel *attributable* to the movement involved.” *See Fuel Surcharges II* at 5 (“railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of fuel *attributable* to the movement involved”) (emphasis added); *Dairyland* at 1 (same).

Cargill’s cost analysis complies with these clear Board directives. For each of the { } study movements, Cargill calculated the actual “incremental cost of fuel” that was “*attributable* to the movement.” Cargill did not include any “fixed” fuel costs in these calculations because fixed costs by definition are not “attributable” to any particular movement. *See, e.g., Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1027 (1996) (“attributable costs” are “incremental costs associated with handling particular traffic” whereas “fixed costs” are a “proxy for unattributable costs” which are the “joint and common costs incurred by a railroad”).

BNSF’s cost analysis ignores the Board’s directives by attempting to include an allocation of fixed costs to the study movements and in so doing mistakenly inflates BNSF’s cost calculations, when compared to Cargill’s calculations, by { }. *See C/M Reb.* at 2. BNSF argues that this adjustment is permissible because BNSF actually incurs the fixed costs, and needs to recover them. BNSF is of course free to recover its fixed fuel costs in the same manner it recovers its other fixed costs – through its base rates. What BNSF cannot do is to use its fuel surcharge to collect fuel costs that are not attributable to the movement subject to the fuel surcharge.

D. Cargill Properly Excluded Non-Locomotive Fuel Costs in Developing BNSF's Actual Incremental Cost of Locomotive Fuel

BNSF artificially jacked-up its study fuel costs {
}, to purportedly account for incremental fuel cost increases

BNSF was incurring in purchasing fuel for vehicles and equipment other than locomotives. *See* Cargill Reb. at 25-27. Most of this other fuel was gasoline. *Id.* at 26.

Cargill properly did not include any non-locomotive fuel costs in its cost analysis. The purpose of BNSF's ATI fuel surcharge is to recover incremental locomotive diesel fuel cost increases not included in base transportation rates. BNSF introduced no evidence showing what level of non-diesel fuel price is included in its base rates and made no attempt to show that a step function intended to recover incremental diesel fuel cost increases bears any correlation whatsoever to BNSF's recovery of its incremental non-locomotive fuel costs. *Id.* In the end, BNSF is attempting to reduce arbitrarily the amount that the ATI is actually over-recovering by adding costs that the ATI was never intended to recover.

BNSF argues for inclusion of non-locomotive fuel costs by referencing the quarterly fuel reports it files with the Board. *See* BNSF Reply at 54. In these reports, BNSF includes its expenditures for both locomotive and non-locomotive fuel. However, the Board made clear when it adopted these fuel reporting requirements that the information contained in the reports "is not intended as a substitute for evidence brought in an individual case." *Fuel Surcharges IV* at 5. Cargill's evidence clearly demonstrates that non-locomotive fuel costs should not be included in calculating BNSF's actual incremental cost of locomotive fuel. *See* Cargill Reb. at 25-27.

IV.

CARGILL HAS DEMONSTRATED THAT BNSF'S PROFITEERING IS DUE TO DESIGN FLAWS IN BNSF'S FUEL SURCHARGE METHODOLOGY

BNSF is collecting massive profits under the ATI due to three design flaws in the ATI.

A. The ATI Uses An Unreasonable Step Function

Cargill's evidence demonstrates that BNSF's use of a 1:4 step function is unreasonable, and its use is the principal reason why BNSF is recovering massive profits under the ATI. Cargill's cost study shows that over the past five years, the reasonable step function BNSF should have employed was 1:5.13 for Ag shipments and 1:4.70 for OF shipments. *See* Cargill Reb. at 31. Had these step functions been employed, BNSF's fuel surcharge recoveries during the five year study period would have closely tracked BNSF's actual incremental fuel cost increases. Cargill developed its corrected step functions using cost and revenue data from its fuel surcharge study and standard regression techniques. Cargill Op. at 26; Cargill Reb. at 29-30.

Cargill's evidence also demonstrates that BNSF's 1:4 step function bears no reasonable nexus to BNSF's actual fuel consumption for two reasons. First, BNSF's actual fuel consumption (using fuel surcharge miles as the divisor) during the five year study period equaled { } MPG for Ag traffic and { } for OF traffic. *See id.* at 32-33. Second, the ATI does not factor in the spread between HDF prices used in the ATI and the prices BNSF actually pays for diesel fuel. When that spread is accounted for, the correct step functions are 1:5.13 for Ag shipments and 1:4.70 for OF shipments. *Id.* at 31.

B. The ATI Uses An Unreasonable Strike Price and First Step Increment

Cargill's evidence demonstrates that BNSF's choice of the \$1.25 HDF strike price equivalent is unreasonable. *See C/M Op. V.S. at 29-31.* BNSF claims that it selected the \$1.25 HDF strike price because that price equated to the \$0.73 per gallon price of diesel fuel BNSF asserts is embedded in its base rates. However, BNSF offers no credible support for its choice. Cargill's analysis demonstrates that all data available to BNSF when it designed the ATI, and all data developed since that time, show that the \$1.25 HDF strike price is too low, and that a reasonable starting HDF price to match the \$0.73 per gallon figure equals \$1.298 per HDF gallon. *See Cargill Reb. at 33-34.*

Cargill's evidence also demonstrates that BNSF's application of the first step function increment is unreasonable because BNSF begins to collect a fuel surcharge at the strike price, even though BNSF has incurred no incremental fuel cost increase at the strike price level. Cargill corrects this error by applying the fuel surcharge at the mid-point of the first step increment. *See Crowley/Mulholland Op. V.S. at 32.*

V.

BNSF'S PROFITEERING IS NOT LEGALLY EXCUSED

Rather than simply admitting that it has engaged in an unreasonable practice by collecting massive profits under the ATI, BNSF claims that its actions are legally excused unless Cargill shows that BNSF intentionally designed the ATI as a profit center ("Bad Intent Defense") or that BNSF's construction of the ATI was the product of bad management decisions ("Bad Management Defense"). *See Cargill Reb. at 38-43.* Alternatively, BNSF argues that its profiteering is excused if the Board assumes BNSF paid more for fuel than it actually paid ("Phantom Fuel Price Defense") and that the amount of profit it recovered is *de minimis* ("*De Minimis* Profiteering Defense"). *Id. at 45-49.*

A. BNSF's Profiteering Is Not Excused Under Its Bad Intent and Bad Management Defenses

BNSF's Bad Intent and Bad Management Defenses find no support whatsoever in the Board's fuel surcharge decisions. The Board made very clear in *Fuel Surcharges*, in *Dairyland*, and in its *Jan. 2011 Decision* in the instant case, that a carrier engages in an unlawful practice if it collects substantial profits under a fuel surcharge due to design flaws in that surcharge.

The Board's rationale here is simple and straightforward. BNSF and other carriers have repeatedly represented to the public that their fuel surcharges are designed to recover incremental fuel cost increases only. However, if, in fact, a carrier is collecting substantial profits under a fuel surcharge, it is deceiving the public, regardless of whether the deception is intentional, or the product of bad business decisions. See *Fuel Surcharges III* at 7; Cargill Reb. at 38-40.

BNSF claims that its Bad Intent Defense is rooted in principles of "misrepresentation theory." BNSF Reply at 21. In fact, federal regulators have long banned the use of the "I did not intend it defense" in many cases involving deceptive conduct. For example, the defense has been rejected in deceptive practice cases arising under Section 5 of the Federal Trade Commission ("FTC") Act (15 U.S.C. § 45(a)(1)), an Act that outlaws, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." See, e.g., *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) ("proof of intention to deceive is not a requisite to a finding of violation of the statute"). The defense is also not permitted under analogous state statutes. See *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 779 (8th Cir. 2010) ("the majority of states with ['little FTC acts'] do not require knowing or intentional deception in order to state an actionable claim under their respective acts").

BNSF cites no legal support for its Bad Management Defense, and with good reason: this Defense has been repeatedly rejected. The Board does not sit as a body that reviews whether a carrier's business practices are rational from the carrier's perspective at the time they were made. Instead, the Board reviews the carrier's practices to determine whether they comport the public interest. *See Consol. Rail Corp. v. ICC*, 646 F.2d 642, 647-48 (D.C. Cir. 1981) (Board's role in an unreasonable practice case is not whether the practice "can be described as 'rational' from the railroads' perspective, but instead whether the practice . . . is reasonable when viewed from the public perspective of the [Board]"). As the Board has repeatedly held, a carrier's use of a fuel surcharge as a profit center is not in the public interest, and is an unreasonable practice.

Moreover, regardless of BNSF's subjective intent, or the rationality – from its perspective – of its business practices, {

} *See* Part II above.

B. BNSF's Profiteering Is Not Excused Under Its Phantom Fuel Price Defense

BNSF's Phantom Fuel Price Defense asks the Board to assume that BNSF paid { } more for diesel fuel during the five-year study period than BNSF actually paid. BNSF makes this calculation through a complex exercise tied to differentials in HDF prices in effect during the study period. *See* Cargill Reb. at 45-46.

BNSF's Phantom Fuel Price Defense is clearly not permitted. The governing legal standards call for the parties to measure the difference between BNSF's fuel surcharge revenues and its "actual incremental cost of fuel." *Jan. 2011 Decision* at 5. BNSF did not pay

the { } Phantom Fuel Price, and inclusion of fuel prices BNSF did not pay has no place in calculating BNSF's "actual incremental cost of fuel." *Id.*

BNSF argues that its Phantom Fuel Price defense is permitted because the Board has approved the use of the HDF index in carrier fuel surcharges. However, Cargill is not asking the Board to order BNSF to use an index other than HDF in the ATI. BNSF is free to use the HDF index, but what BNSF clearly is not permitted to do is to incorporate the HDF index into the ATI in a manner that produces fuel surcharge revenues that are “substantially in excess of the actual incremental cost of fuel,” (*id.*) which is exactly what it has done. Cargill Reb. at 46-48.

C. BNSF's Profiteering Is Not Excused Under Its *De Minimis* Profiteering Defense

BNSF's *De Minimis* Profiteering Defense has two prongs. The first prong is that the level of its profit-taking is not significant. This contention is wrong for the reasons summarized in Parts I and II above. BNSF's profiteering is significant {

} much less BNSF's actual profit levels – \$560.9 million. The second prong of BNSF's *De Minimis* Defense is that its significant profiteering should be excused due to a hodge-podge of fall-back arguments, none of which has any merit:

- BNSF claims that its substantial profiteering is permitted because of the “myriad” of factors affecting fuel surcharge revenues and costs, “some degree of over-or under-recovery would be expected of any fuel surcharge program.” Fisher Reply V.S. at 36. While some *de minimis* over-recoveries may be tolerated, the Board held in its *Jan. 2011 Decision* that over-recoveries cross the line and become unreasonable practices when they result in revenue collections that are “substantially in excess of the actual incremental cost of fuel.” *Id.* at 5. That line has clearly been crossed in this case.

- BNSF claims that its substantial profiteering is justified because “economic conditions obviously will change over time, producing fluctuations in recovery percentages.” Fisher Reply V.S. at 37. While “economic conditions” may change, in this case Cargill evaluated BNSF’s application of the ATI to every single shipment moving under the ATI over a five year time period – a total of { } shipments. Cargill’s study is the most comprehensive and detailed fuel surcharge cost study ever presented to the Board. Cargill’s comprehensive study captures all pertinent “economic conditions” over a five-year period and shows that the ATI is producing substantial profits to BNSF due to three fundamental flaws in the ATI’s design. This proof is exactly the proof the Board held in its *Jan. 2011 Decision* Cargill needed to make to demonstrate that BNSF was engaged in unlawful fuel surcharge practices.

- BNSF claims that its substantial profiteering is permitted because the parties’ cost studies capture BNSF’s fuel efficiency gains, but “make no attempt to account for the offsetting capital costs incurred to achieve those efficiency gains.” Fisher Reply V.S. at 38. This argument is a red-herring. BNSF recovers the capital costs it incurs in purchasing more fuel efficient locomotives and other equipment in its base rates, as adjusted. Ag and OF shippers are already compensating BNSF for these, and other investments, in their rates. They are not required to pay for these investments twice, which is why the Board requires that fuel surcharges recover only actual incremental fuel cost increases.

VI.

CARGILL SEEKS REASONABLE PRESCRIPTIVE RELIEF

Cargill asks the Board in Phase I of this case to remedy BNSF’s massive profiteering under the ATI by taking three prescriptive actions.

A. The Board Should Prescribe Reasonable Step Functions

BNSF's use of the 1:4 step function is the principal reason why the ATI is generating massive over-recoveries and profits. Cargill requests that the Board remedy this unreasonable practice by prescribing reasonable step functions of 1:5.13 for ATI Ag traffic and 1:4.70 for ATI OF traffic.

BNSF argues that since BNSF has applied a single surcharge step function to both Ag and OF traffic, the Board lacks the legal authority to prescribe separate step functions for the two traffic groups subject to the ATI: Ag and OF traffic, the latter of which is over { } industrial traffic. *See* BNSF Reply at 48-49. Cargill's evidence shows that the lion's share of BNSF's \$560.9 million over-recovery is coming from BNSF's Ag traffic (\$490 million)⁹ and the Board's "broad authority" to prescribe reasonable fuel surcharge practices certainly includes the authority to remedy this massive overcharge by prescribing separate step functions for Ag and OF traffic.¹⁰

Moreover, the Board has emphasized that fuel surcharges should not result in one class of traffic "cross-subsidizing" another class of traffic. *See E.I. DuPont De Nemours & Co. v. CSXT Transp., Inc.*, STB Docket No. 42099 (STB served June 30, 2008) at 11. In this case, applying a single fuel surcharge step-function to Ag and OF traffic results in a cross-subsidy because Ag traffic in general, and Ag unit train traffic in particular, are far more fuel efficient than BNSF's OF traffic. Applying a correct composite fuel surcharge step function to both traffic

⁹ This figure was mistakenly designated as Highly Confidential in C/M Reb. Exh. 15.

¹⁰ *Fuel Surcharges I* at 2. The prescription of separate Ag and OF step rates is also consistent with the Board's directives that fuel surcharges bear a "reasonable nexus to fuel consumption." *Dairyland* at 6. Prescription of separate step functions takes into account the fact that Ag and OF traffic have different fuel consumption rates, with more fuel efficient Ag traffic having higher MPG's than OF traffic. *See* C/M Reb. at 38-40.

groups results in Ag shippers paying more than their actual incremental fuel cost increases on their traffic to subsidize OF shippers who pay less than their actual incremental fuel cost increases.

Finally, prescription of separate step rates for Ag and OF traffic is consistent with BNSF's repeated representations to the Board that the goal of its mileage-based fuel surcharge programs "is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit." *Fuel Surcharges*, BNSF Comments (Oct. 2, 2006) at 4. BNSF's Ag and OF traffic are separate business units, so prescription of separate step functions for each "reflect[s] the operational requirements of each business unit" and is also consistent with {

} *See*

Cargill Op. at 35 n.38 (citing D-14158).

B. The Board Should Issue Reasonable Prescriptive Relief Correcting Other Errors in the ATI and Setting the Unlawful Amounts BNSF Has Collected from Cargill Under the ATI

Cargill requests that the Board prescribe an HDF starting price of \$1.298. This figure represents a reasonable HDF equivalent of the \$0.73 per gallon fuel price BNSF claims is embedded in its base rates (for traffic now moving under the \$1.25 HDF base). Cargill also requests that the Board remedy the unreasonableness in BNSF's application of the first step ATI increment by prescribing that the ATI be initiated at the strike price plus one-half of the first step increment. This relief is necessary to prevent BNSF from collecting a fuel surcharge when it has incurred no actual incremental fuel cost above that reflected in its base rates.

Finally, Cargill requests that the Board find that Cargill has been overcharged on its regulated traffic by \$26,794,305 (plus interest) during the time period April 19, 2008 to

December 31, 2010. This amount equals the difference between the surcharges Cargill paid on its regulated Ag and OF traffic during this time period and the amount of surcharges Cargill should have paid had BNSF engaged in reasonable fuel surcharge practices.

CONCLUSION


For the reasons set forth above, and in Cargill's Opening and Rebuttal submissions, Cargill respectfully requests that the Board find that BNSF has engaged in unreasonable fuel surcharge practices and that the Board grant Cargill's request for prescriptive relief.

Respectfully submitted,

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: April 2, 2012

By: John H. LeSeur 
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2012, I caused copies of the foregoing Final Brief to be served by hand on counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Linda S. Stein, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036



Peter A. Pfohl